

United States
Court of Appeals
For the Ninth Circuit

EINAR GLASER and DOROTHY GLASER,
Appellants,

vs.

MARGUERITE L. CONNELL,
Appellee,
WILLIAM F. WHITE and JANET D. WHITE,
Defendants.

Petition for Rehearing

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TO: The Honorable James Alger Fee, William Healy
and Oliver D. Hamlin, Jr., Circuit Judges:

Appellants hereby petition this Honorable Court for
a rehearing of the within appeal, the judgment on
appeal having been filed December 17, 1958.

I.

The Court incorrectly transposed the basic facts and
because of this, it resulted in its ultimate conclusion
being based upon a faulty premise.

ARGUMENT

In applying the law to the facts of a case, it is vital that the evidence be appraised in its true and proper setting. Here the Court incorrectly transposed the basic facts and because of this error, the ultimate conclusion is without a foundation to support it.

In stating, "The Glasers knew that Errion was an accomplished confidence man and a fabulous rascal," the Court could only have reached this conclusion by incorrectly taking the facts out of their true sequence of circumstances and/or events.

Neither the Findings of Fact or the evidence support a conclusion that the Glasers knew of Errion's fabulous character until they had already been conned of many thousands of dollars. And their knowledge of Errion's fabulous character, as the evidence without dispute shows, only came **after** March 17, 1952. This was long after appellee, with prior knowledge of Errion's fabulous character, placed in his hands her \$16,000 note and mortgage.

CHRONOLOGY

By Findings of Fact No. 6 (Tr. 19), Glasers purchased the \$16,000 note and mortgage involved in this cause from Errion in August, 1951, paying Holdorf Oyster Corporation \$16,000. On that occasion, there

is no evidence they were aware of Errion's fabulous character. The Court's conclusions are inconsistent with the Finding of Fact. It was not until the Spring of 1952, or later, when Glasers began to realize that Errion was a confidence man and they were being duped. In this regard, the Court is respectfully referred to its opinion in **McKenney v. Buffelin Mfg. Co.**, 232 F. 2d. 5, where it appears that it was during the year 1951, Glaser and his partner McKenney, **fell** into the hands of Errion who "led them to the point of no return" . . .

Also, the credulity of Glasers in relation to being conned by Errion, is clearly manifested by Findings of Fact No. 3 (Tr. 22) appellee's counter-claim. It appears therefrom that on March 17, 1952, Einar Glaser executed and delivered to an alter ego of Errion, (the National Forest Products Corporation), a promissory note for \$20,000, which note was obtained from him in exchange for his own money upon false and fraudulent representations of Errion, which note was subsequently transferred to and accepted by appellee, who had full knowledge then of Errion's fabulous character.

By Findings of Fact No. 9 (Tr. 24), appellee was aware of the background of Errion and Holdorf and that they had the general reputation of cheaters and defrauders and were confidence men and had swindled

her and others. The record reveals, without dispute, that Errion had been engaged in perpetrating his fraud upon appellee, commencing in 1949 and by January, 1951, and before she voluntarily and knowingly placed her \$16,000 note and mortgage in his hands (Tr. 66), she was fully cognizant he was a confidence man. In this respect, the Court erroneously stated, "She made no representations, false or otherwise, to the Glasers."

It was to recover a part of her property conned from her that she entered into a scheme with Errion on his representation of a quick sale of her property. By her employment of Errion and placing in his hands the \$16,000 note and mortgage, such conduct unquestionably and, at least, vicariously constituted representations upon which the Glasers relied; c.f. **Hutson v. Walker**, 37 Wn. 2d., 12, 221 P. 2d, 506, where the plaintiff entrusted an automobile to a wrongdoer and executed a blank certificate of title.

Conversely, there is not one word of testimony in this cause that Glasers had any prior knowledge of Errion's chicanery and that he was "an accomplished confidence man and a fabulous rascal." As we have stated, it was not until sometime **after** March 17, 1952, the day Errion returned \$20,000 to Glaser—Glaser's own money—at which time Errion conned Glaser into

executing the \$20,000 note. Findings of Fact No. 3 (Tr. 22).

Between August, 1951, when Glasers paid over \$16,000 to Errion for appellee's note and mortgage and March 17, 1952, when the \$20,000 note was executed, Glasers were veritably Errion's victims. Between the same period of time, it was appellee who was then fully cognizant she had been defrauded by Errion and he was "an accomplished confidence man and a fabulous rascal."

Given these undisputed facts in their true chronological sequence, the conclusion of the Court concerning the inapplicability of the maxim, "when one of two innocent parties must suffer a loss, it must be borne by the one whose conduct rendered the injury," is manifestly erroneous and clearly negates a well established and recognized equitable principle.

II.

The Court in its opinion also stated, "Their failure to make any investigation after they knew the facts sufficient to charge them with notice defeat recovery."

The record unequivocally shows that Glasers had no knowledge that "Errion was an accomplished confidence man and a fabulous rascal" until **after** March 17, 1952. By that time, they had already been swindled

and duped out of many thousands of dollars, including the purchase of the \$16,000 note and mortgage here involved. Any knowledge of Errion's fabulous character by the Glasers was long **after** the time appellee had employed him to sell her home and placed in his hands the aforesaid \$16,000 note and mortgage with full knowledge of his incredible mendacity.

Because of the incorrect transposition of the chronological sequence of the undisputed facts and circumstances in this cause, the opinion of the Court is manifestly faulty and without any genuine foundation to support its ultimate conclusions.

As litigation is pending in other courts involving Errion's machinations resulting in substantial monetary losses to Glasers, it is of extreme importance that the opinion of this Court not be seized upon as an authority, particularly where the Court stated the evidence out of its chronological sequence.

Pursuant to Rule 23, appellants petition this Court for a rehearing.

Respectfully submitted,

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Attorneys for Appellants.

CERTIFICATE OF COUNSEL

Leo Levenson, Norman B. Kobin, Wayne W. Wright and Layton A. Power, attorneys for appellants, hereby certify that in our opinion the above petition for rehearing is well founded and is not interposed for delay.

LEO LEVENSON,
NORMAN B. KOBIN,
WAYNE W. WRIGHT,
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Attorneys for Appellants.

